STATE OF MICHIGAN
IN THE SUPREME COURT

LESLIE J. MURPHY, Plaintiff-Appellant, v. SAMUEL M. INMAN, III, JOHN F. SMITH, BERNARD M. GOLDSMITH, WILLIAM O. GRABE, LAWRENCE DAVID HANSEN, ANDREAS MAI, JONATHAN YARON, ENRICO DIGIROLAMO, Defendants-Appellees.	Supreme Court Case No. _____ Court of Appeals Case No. 345758 Oakland Circuit Court Case No. 2017-159571-CB

PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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ORDER APPEALED AND BASIS FOR JURISDICTION

Plaintiff-Appellant Leslie J. Murphy ("Plaintiff") seeks leave to appeal the Michigan Court of Appeals' decision dated April 30, 2020, affirming the order of the Oakland County Circuit Court granting summary disposition to Defendants (former directors and officers of Covisint Corporation) on the basis that Plaintiff's breach of fiduciary claims are derivative rather than direct in nature. *See Murphy v Inman*, unpublished opinion per curiam of the Court of Appeals, issued April 30, 2020 (Docket No. 345758). This Court has jurisdiction to consider this application pursuant to MCR 7.303(B)(1) and MCR 7.305(C)(2)(a), as Plaintiff seeks leave to appeal a decision from the Court of Appeals and this application has been filed within 42 days after entry of the Court of Appeals' decision affirming the order of the Circuit Court.

The issue raised by this appeal "involves a legal principle of major significance to the state's jurisprudence" (MCR 7.305(B)(3)): Whether shareholders of Michigan corporations have standing to bring direct claims against directors and officers for breaching their fiduciary duties in connection with orchestrating an unfair cash-out merger, or rather, as the Court of Appeals effectively held, such shareholders have no legal recourse in Michigan. In multiple recent opinions including the one at issue, the lower courts of this State have embraced a legal framework where "director misconduct relating to the transaction…escape[s] review by the fortuity of the intervening merger[,]" *Rael v Page*, 147 NM 306, 310-311; 222 P3d 678, 683 (NM App, 2009), and have "grant[ed] immunity to [] corporate executive[s] who sought out a merger with unclean hands." *Moore v Macquarie Infrastructure Real Assets*, 258 So 3d 750, 757 (La App 3 Cir 12/13/17). "[S]uch a result [is] untenable[,]" and, absent intervention by this Court, "[a] shareholder who is victim to such a situation is left with no access to [the] courts for recourse." *Id*.

Plaintiff respectfully requests that this Court correct the clearly erroneous result below, and remedy this material injustice. *See* MCR 7.305(B)(5)(a).

QUESTION PRESENTED FOR REVIEW

Whether Plaintiff has standing to bring direct rather than derivative claims against Defendants for breaching the statutory and common law fiduciary duties of care, good faith, loyalty, candor, and maximization of shareholder value that they owed to Covisint shareholders in connection with the cash-out merger between Covisint and OpenText?

Plaintiff-Appellant says: Yes

Defendants-Appellees say: No

Court of Appeals says: No

MATERIAL FACTS AND PROCEEDINGS

I. The Parties

Plaintiff Leslie Murphy was, at all relevant times, a shareholder of Covisint, Inc. ("Covisint" or the "Company"). Amended Complaint for Breach of Fiduciary Duties, Appellant's Appendix in the Court of Appeals, Ex. B (pg. 009-067), ¶ 25.[1] Prior to the consummation of the merger at issue ("Merger") with OpenText Corporation ("OpenText"), Covisint was a Michigan corporation headquartered in Southfield, Michigan. ¶ 2.

Defendants Samuel M. Inman, III, John F. Smith, Bernard M. Goldsmith, William O. Grabe, Lawrence David Hansen, Andreas Mai, and Jonathan Yaron each served as a director of

[1] All citations denoted as "¶_" refer to the Amended Complaint for Breach of Fiduciary Duties, which appears in Appellant's Appendix as Exhibit B (pg. 009-067).

Covisint. ¶¶ 26-33. Mr. Inman also served as the Company's President and Chief Executive Officer. ¶ 26. Defendant Enrico Digirolamo served as Covisint's Chief Financial Officer. ¶ 27.[2]

II. Summary of Plaintiff's Allegations

In the Amended Complaint, Plaintiff alleges Defendants breached both their common law and statutory fiduciary duties in connection with the Merger, announced on June 5, 2017, whereby Plaintiff and the putative class of former Covisint shareholders he seeks to represent had their shares cashed-out for grossly unfair consideration of only $2.45 per share. ¶¶ 3, 4, 25, 51.

The $2.45 per share merger consideration represented a meager 2% premium compared to the Company's 52-week high closing price of $2.40, and was significantly below the indications of interest other bidders submitted between February 2016 and February 2017, which ranged as high as $3.75 per share. ¶ 4. Analysts' best estimates valued shareholders' shares at $3.00 to $5.00 per share. ¶ 46. One sophisticated shareholder described the merger consideration as "completely inadequate," and explained that it was "wholly irresponsible" for the Defendants to agree to the Merger after the Company had just posted strong first quarter financial results. ¶ 8.

Despite the inadequacy of the merger consideration OpenText offered to pay Covisint shareholders, Plaintiff alleges that Defendants agreed to approve the Merger for personal and selfish reasons. Specifically, the Merger provided Defendants with unique benefits, including the accelerated vesting of restricted stock units and stock options and significant "change in control" payments, and allowed them to leave their positions after years of criticism for poor job performance without further public embarrassment and to avoid the significant risk of being fired or removed from the board. ¶¶ 137-142. Indeed, prior to the announcement of the Merger, certain Defendants and other members of Covisint's management team faced sharp criticism for

[2] The individuals identified in this paragraph are collectively referred to as the "Defendants".

mismanaging the Company, profiting from excessive compensation, and failing to exercise proper oversight. ¶¶ 111-136. Covisint's directors faced the threat of proxy contests to unseat them from multiple sophisticated investors. ¶¶ 114-122.

On August 25, 2016, the Covisint board entered into a cooperation agreement with one investor, Dialectic Capital Management LP ("Dialectic"), pursuant to which the Company agreed to appoint Defendants Andreas Mai, John F. Smith, and Jonathan Yaron to the board. ¶ 122. Concurrently with their appointment, Covisint announced that two directors would be leaving the board. The four incumbent directors, Defendants Inman, Goldsmith, Grabe, and Hansen, were able to salvage their directorships for the time being, and avoided the embarrassment of losing their jobs in a proxy contest launched by a shareholder accusing them of poor performance and a lack of oversight. ¶ 123. Shortly thereafter, the newly constituted board promptly began exploring a merger. ¶ 124. In less than two months, the Defendants went from hearing offers to conducting a fundamentally flawed sales process, during which OpenText was favored over other bidders, who were impeded from making Covisint shareholders a superior offer. ¶¶ 124, 10-15, 143-145.

By late March of 2017, two of the Defendants, Messrs. Mai and Yaron, recognized that the sales process had not resulted in a fair offer price for shareholders, and that the Company had other alternatives to increase shareholder value. All the Defendants, via multiple statements by Messrs. Mai and Yaron, were made aware that the received offers were unreasonably low. Defendants were also aware that there was absolutely no need to agree to a merger at that time, as there were multiple viable strategic alternatives to increase shareholder value. ¶ 125. Unfortunately for Covisint shareholders, the rest of the board and management were committed to finalizing a merger with OpenText. The hold-over directors and officers, Messrs. Inman, Goldsmith, Grabe, Hansen and Digirolamo, were eager to wrap up a deal rather than face another year of pressure and criticism

from Dialectic. ¶ 126. Approving the Merger allowed these Defendants to gracefully leave their positions with the Company (rather than being removed in a proxy contest or pressured to resign) and to obtain personal financial benefits, including severance payments and the accelerated vesting of restricted stock units and options. *Id*. Defendants also recognized that certain large activist investors that had previously threatened a proxy contest supported finalizing a merger promptly rather than pursuing other strategic alternatives because of their liquidity needs. ¶¶ 114-115, 127-135. Defendants Mai and Yaorn ultimately caved and agreed to rubber-stamp the deal, despite recognizing that the flawed strategic review process resulted in the grossly inadequate offer from OpenText and that there were alternative courses of action available to increase shareholder value. ¶¶ 7, 49, 83, 85, 111, 125, 126.

After approving the merger agreement on June 5, 2017, Defendants, in breach of their duty of candor, authorized a materially deficient proxy statement to be disseminated to shareholders to solicit their approval of the Merger. ¶¶ 17, 146-165. The Merger was ultimately approved by a razor-thin margin, with an unprecedentedly low 52.17% of the outstanding shares of Covisint voting to approve it. ¶ 9. When accounting for the approximately 4.66% of the Covisint shares owned or controlled by Defendants and Covisint's other executive officers, the Merger was not approved by a fully informed, disinterested majority of the Company's shareholders. *Id*.

In the Amended Complaint, Plaintiff alleges that Defendants—by virtue of their conduct in orchestrating the unfair Merger—breached both the common law and statutory fiduciary duties they owed to Covisint shareholders, namely their duties to maximize shareholder value and their duties of candor, loyalty, good faith and care. ¶¶ 16-20, 34-42, 51, 110, 172-174.

III. Proceedings Below

On June 30, 2017, Plaintiff filed his initial Complaint for Breach of Fiduciary Duties in the Circuit Court.

On September 5, 2017, Plaintiff filed an Amended Complaint.

On October 6, 2017, Defendants filed a notice of removal, removing this action to the U.S. District Court for the Eastern District of Michigan. Thereafter, Plaintiff filed a motion to remand this action to the Circuit Court, which was granted on February 21, 2018. The case was reopened in the Circuit Court on March 2, 2018.

On March 26, 2018, Defendants filed their Motion for Summary Disposition, seeking dismissal of the Amended Complaint pursuant to MCR 2.116(C)(5) and (8). Plaintiff filed his Memorandum in Opposition to Defendants' Motion for Summary Disposition on May 16, 2018, and Defendants filed their Reply on May 30, 2018.

On June 13, 2018, counsel for the parties appeared before the Honorable Wendy Potts for a hearing on Defendants' Motion for Summary Disposition.

On September 17, 2018, Judge Potts entered an Opinion and Order Granting Summary Disposition pursuant to MCR 2.116(C)(5) on the grounds that Plaintiff lacked standing to bring a direct claim for breach of fiduciary duty.

On October 4, 2018, Plaintiff filed his Claim of Appeal. Thereafter, the parties filed their respective briefs, and oral argument was held on February 11, 2020.

On April 30, 2020, the Court of Appeals issued its opinion affirming the Circuit Court's order on the basis that Plaintiff's claims are purportedly derivative in nature, but found that the Circuit Court should have granted the motion under MCR 2.116(C)(8) rather than (C)(5). *Murphy*, unpub op at 2-5.

On June 10, 2020, Plaintiff timely filed this Application for Leave to Appeal to this Court. *See* MCR 7.305(C)(2).

STANDARD OF REVIEW

A trial court's decision concerning a motion for summary disposition is reviewed de novo. *Mich Ass'n of Home Builders v City of Troy*, 504 Mich 204, 211; 934 NW2d 713, 718 (2019). The issue of whether a party has standing to assert a claim, along with all other pure questions of law, are also subject to de novo review. *Id*. at 212.

ARGUMENT

I. Whether Shareholders Have Standing To Bring Direct Claims When Their Fiduciaries Orchestrate An Unfair Cash-Out Merger Is An Issue Of Major Significance To The State's Jurisprudence, And The Lower Courts' Repeated Shuttering Of The Courthouse Doors To Aggrieved Shareholders Is A Material Injustice

The issue raised by this appeal "involves a legal principle of major significance to the state's jurisprudence[.]" MCR 7.305(B)(3). Specifically, Plaintiff calls upon this Court to resolve whether shareholders of Michigan corporations have standing to bring direct claims against a corporation's directors and officers for breaching their fiduciary duties in connection with orchestrating an unfair cash-out merger.

Shareholders across the country invest their hard-earned money in publicly-traded Michigan corporations, providing them with necessary capital. However, in multiple recent opinions including the one at issue, the lower courts of this State have told shareholders that they have no legal recourse when the directors and officers of the corporations they invest in effectuate cash-out mergers via unfair dealing, which results in shareholders having their shares taken from them for inadequate consideration. Specifically, the lower courts—including the Court of Appeals in this case—have dismissed such claims on the basis that they are purportedly derivative rather than direct. *See Murphy*, unpub op at 5; *Karmanos v Bedi*, unpublished opinion per curiam of the Court of Appeals, issued November 29, 2018 (Docket No. 336577), p 3-5; 2018 Mich App LEXIS

3603, at *6-9; *Chang v Syntel, Inc.*, unpublished opinion of the Oakland County Circuit Court, issued May 20, 2019 (Docket No. 18-170343-CB), p 4-10; 2019 Mich Cir LEXIS 650. That conclusion is both "clearly erroneous" and "will cause material injustice" to shareholders. MCR 7.305(B)(5)(a).

Faced with this issue, the appellate courts of several other states have all reached the clearly correct conclusion: When fiduciaries breach their duties in conjunction with orchestrating a merger that results in shareholders having their shares taken from them for inadequate consideration, the shareholders have standing to bring a direct action because they—not the corporate entity—are the ones injured. *See Parnes v Bally Entm't Corp.*, 722 A2d 1243, 1245 (Del, 1999) ("A stockholder who directly attacks the fairness or validity of a merger alleges an injury to the stockholders, not the corporation[.]"); *Cohen v Mirage Resorts, Inc.*, 119 Nev 1, 19; 62 P3d 720, 732 (2003) ("A claim brought by a dissenting shareholder that questions the validity of a merger as a result of wrongful conduct on the part of majority shareholders or directors is properly classified as an individual or direct claim. The shareholder has lost unique personal property-his or her interest in a specific corporation."); *Shenker v Laureate Educ., Inc.*, 411 Md 317, 342; 983 A2d 408, 422 (2009) ("[I]a cash-out merger transaction where the decision to sell the corporation already has been made, shareholders may pursue direct claims against directors for breach of their fiduciary duties of candor and maximization of shareholder value."); *Rael*, 147 NM at 311 ("[W]e conclude that a stockholder who directly attacks the fairness or validity of a merger alleges a direct injury to the stockholders, not the corporation."); *Moore*, 258 So 3d at 757 ("Plaintiffs are attempting to recover what they claim are losses they personally sustained when Defendants engaged in practices that sold/merged [the corporation] for a price less than its potential, using a method more beneficial to Defendants, personally. [] [T]he corporation [] did not suffer any loss according to Plaintiffs'

petition in this regard. Its status would change from existing as a corporation to no longer existing in the same capacity because of the merger, regardless of the price paid in order to have that merger occur.").

Conversely, the Court of Appeals here reached the opposite, clearly erroneous, and inequitable conclusion. Mischaracterizing Plaintiff's claims as derivative will cause a material injustice and leave aggrieved Covisint shareholders with no recourse. "If the claims are derivative, they have transferred by operation of law" to "the surviving entity which was benefited rather than harmed by the breach of the duty [] committed by the" fiduciary Defendants. Daniel S. Kleinberger, *Direct Versus Derivative and the Law of Limited Liability Companies*, 58 Baylor L Rev 63, 88-110 (2006) ("*Kleinberger Article*").[3] In other words, by misclassifying such claims as derivative, the lower courts of this State have established an absurd legal framework that can only provide a windfall to the acquiring entities that shortchanged the shareholders of the acquired corporation; because the shareholders have been cashed-out in the merger, they do not benefit from any recovery by the acquiring corporation. And no rational shareholder would pursue a claim that could only benefit the acquiring corporation that shortchanged them for their stock, but would provide them with no benefit at all. To tell shareholders in such a situation that they can file a derivative claim is equivalent to telling them they have no legal recourse. As the New Mexico Court of Appeals explained, "[i]f Plaintiff's claims are viewed as only derivative, any actual director misconduct relating to the transaction would otherwise escape review by the fortuity of the intervening merger." *Rael*, 147 NM at 310-11. The Louisiana Court of Appeals also aptly summarized the injustice that results from mischaracterizing claims like Plaintiff's as derivative:

[3] Professor Kleinberger's article has been cited by at least twelve different courts tasked with distinguishing between direct and derivative claims.

> [Such a] result would grant immunity to a corporate executive who sought out a merger with unclean hands. A shareholder who is victim to such a situation is left with no access to our courts for recourse. Prior to the merger, such an innocent shareholder could not bring an action given the lack of ripeness of the claim, *i.e.*, the financial harm would have yet to occur. After the merger, the innocent, now former shareholder is left with no avenue to recover any damages due to a supposed no right of action, because any such suit must be derivative and the corporation no longer exists. Such a result also violates a strong public policy of a party having its day in court. We find such a result untenable.

Moore, 258 So 3d at 757.

If left undisturbed, the Court of Appeals' clearly erroneous decision will have a chilling effect on shareholders' willingness to invest in Michigan corporations, and will place Michigan law at odds with the law in numerous other states. Accordingly, review by this Court is warranted.

II. The Opinion Below Is The Latest By The Lower Courts Of This State To Misapply The Common Law Test For Distinguishing Direct From Derivative Claims, Which Is An Issue This Court Has Never Meaningfully Addressed

Over the past century, appellate courts across the country have developed common law tests for distinguishing direct claims from derivative ones. *See Keller v Estate of McRedmond*, 495 SW3d 852, 870-71(Tenn, 2016); *Kleinberger Article*, 58 Baylor L Rev at 88-110. However, this Court has stayed conspicuously silent on the issue. Plaintiff respectfully submits that it is time for this Court to provide much needed clarity in this area, which would benefit both shareholders and Michigan corporations. As other appellate courts and scholars have noted, "[t]he threshold determination of whether a lawsuit filed by a shareholder is derivative or direct 'is sometimes difficult and has many legal consequences, some of which may have an expensive impact on the parties to the action.'" *Keller*, 495 SW3d at 869 (quoting *Tooley v Donaldson, Lufkin, & Jenrette, Inc.*, 845 A2d 1031, 1036 (Del, 2004)). Given that "the question of whether a particular claim is derivative or direct is not addressed by the revised Model Corporation Act or by state statutes governing corporations, [] the question must be answered by the state courts." *Id.* at 869-70. And in recent years, various states' highest courts have found it prudent to address the issue, given that

"the law governing corporations in various jurisdictions has evolved" in recent decades. *Id*. at 876. Indeed, appellate courts across the country have recently attempted to clarify their state's law on the issue by adopting a uniform analytical framework modeled after Delaware's case law, which "'has been cited and applied in a host of jurisdictions'" and "is increasingly cited with approval as the issue makes its way up to the supreme courts of the various states." *Id*. at 876-77.

Generally speaking, three methods have emerged for distinguishing direct claims from derivative ones. They are commonly referred to as the "duty owed" approach, the "direct harm" approach, and the "special injury" approach. *Id.* at 870-71; *Kleinberger Article*, 58 Baylor L Rev at 88-110; 19 Am Jur 2d, Corporations, §§ 1923-1928 (2019). The duty owed approach "requires a court to first decide whether a duty was breached and then, if so, determine to whom that duty was owed." *Keller*, 495 SW 3d at 871; *Kleinberger Article*, 58 Baylor L Rev at 106. The direct harm approach asks "who got hurt first – the entity or its owner(s)." *Kleinberger Article*, 58 Baylor L Rev at 88. And the special injury approach generally requires the plaintiff to allege an injury that is not only distinct from an injury suffered by the corporation, but also from any injury suffered by all other shareholders of the corporation. *Id*. at 93. However, some courts have found that, even under the special injury approach, "the wrong need not be unique to the stockholder; an injury may affect a substantial number of stockholders and still support a direct action if it is not incidental to an injury to the corporation…the key requirement is an injury distinct from the injury to the corporation, rather than distinct from the injury to the other shareholders." 19 Am Jur 2d, Corporations, § 1927. Because courts have articulated these tests with differing language and have sometimes merged or conflated the approaches, the result has often been "confused and confusing opinions." *Kleinberg Article*, 58 Baylor L Rev at 88 (collecting cases); *Keller*, 495 SW 3d at 869-

71 (explaining how courts have utilized the different analytical approaches in combination, and providing examples of the various verbal formulas used).

Looking to other jurisdictions, Michigan's lower courts have adopted the above-referenced common law tests for distinguishing direct claims from derivative ones, but they have failed to properly apply the tests when shareholders allege breaches of fiduciary duties in the context of a merger. *Supra* Argument § I. In *Mich. Nat'l Bank v Mudgett*, 178 Mich App 677; 444 NW2d 534 (1989), the Court of Appeals essentially combined the duty owed approach and the direct harm approach into a joint inquiry, finding that a shareholder may pursue a direct action "where the individual shows a violation of a duty owed directly to him" and the alleged injury does *not* result "only from the injury to the corporation." *Id*. at 679-80 (citing *Schaffer v Universal Rundle Corp*, 397 F2d 893, 896 (CA 5, 1968)); *see also Belle Isle Grill Corp v City of Detroit*, 256 Mich App 463, 474; 666 NW2d 271, 278 (2003) (reiterating the test set forth in *Mudgett*). And in *Christner v Anderson, Nietzke & Co., PC*, 156 Mich App 330; 401 NW2d 641 (1986), affirmed in part and overruled in part on other grounds by *Christner v Anderson, Nietzke & Co., PC*, 433 Mich 1; 444 NW2d 779 (1989), the Court of Appeals recognized a version of the special injury approach, finding that a shareholder may pursue a direct claim "'when he has sustained a loss separate and distinct from that of other stockholders generally.'" 156 Mich App at 345 (quoting 19 Am Jur 2d, Corporations, § 2245, p 147).

This Court has never addressed the issue in a thorough opinion with a clear holding. While the Court touched on the issue over thirty years ago in *Christner*, it simply "agree[d] that [the] plaintiff" there could maintain an individual action without further elaboration on the common law

test applied in that case, and without any reference to the distinct test set forth by the Court of Appeals in *Mudgett*. *See Christner*, 433 Mich at 9.[4]

With respect to the *Mudgett* test, the Court of Appeals here (along with the lower courts in other recent opinions) failed to correctly apply it. As the Court of Appeals recognized, directors owe shareholders both a "duty to maximize shareholder value" and a duty of candor. *Murphy*, unpub op at 5.[5] But the Court of Appeals concluded that those duties "are not duties owed directly

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[4] Although Plaintiff did not rely on the *Christner* "loss separate and distinct from that of other stockholders" test in arguing his claims are direct, that test generally precludes shareholders from utilizing the class action device to bring claims, since a prerequisite to class certification is that the plaintiff's claims "are typical of the claims" of other stockholders and that common questions predominate. MCR 3.501(A)(1). Such an outcome runs counter to the purpose of the class action device, which was intended to facilitate the aggregation and litigation of small-value shareholder claims. *See Amchem Prods. v Windsor*, 521 US 591, 616-17 (1997). Furthermore, as the U.S. Court of Appeals for the Second Circuit Court explained, the *Christner* "special injury" approach "could lead to situations in which shareholders are improperly left with an injury without legal recourse[,]" since "[t]here may be acts that injure shareholders equally but do not injure the corporation at all[.]" *Strougo v Bassini*, 282 F3d 162, 172 (CA 2, 2002).

[5] Numerous cases from this Court and others have recognized directors and officers owe a duty to maximize shareholder value and a duty of candor. *See, e.g.*, *Dodge v Ford Motor Co.*, 204 Mich 459, 507; 170 NW 668, 684 (1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."); *Thompson v Walker*, 253 Mich 126, 135; 234 NW 144, 147 (1931) (recognizing officers and directors have a duty "to produce to each stockholder the best possible return for his investment."); *Glidden Co. v Jandernoa*, 173 FRD 459, 477 (WD Mich, 1997) ("In the context of the sale of a corporation, this fiduciary duty requires directors and corporate management to obtain the highest available value for stockholders.") (citing *Edelman v Fruehauf Corp*, 798 F2d 882, 886 (CA 6, 1986) (applying Michigan law)); *Torrey v Toledo Portland Cement Co*, 158 Mich 348, 353; 122 NW 614, 616 (1909) (noting fiduciaries "are held to the strictest honesty and open dealing. It is immaterial whether they gained or lost by the transaction. It is sufficient to establish liability if those with whom they dealt in this fiduciary capacity have suffered loss by their concealment of facts or misrepresentation."); *Pikes Peak Co. v Pfuntner*, 158 Mich 412, 415; 123 NW19, 20 (1909) ("One occupying a confidential and fiduciary relation to another is held to the utmost fairness and honesty in dealing with the party to whom he stands in that relation."); *Thomas v Satfield Co*., 363 Mich 111, 117; 108 NW2d 907, 910 (1961) (noting a duty "to make a full disclosure" existed by virtue of "the fiduciary responsibilities placed upon corporate officers and directors"); *Lumber Vill., Inc. v Siegler*, 135 Mich App 685, 695; 355 NW2d 654, 658 (1984) ("[T]here is an affirmative duty to disclose where the parties are in a fiduciary relationship."); *accord Chen v Howard-Anderson*, 87 A3d 648, 687 (Del Ch, 2014) ("When directors submit to the stockholders a transaction that requires stockholder approval, such as a merger, '[t]he directors

to the shareholders that [are] distinct from, or independent of, the corporation," and that the resulting harm is "done to the corporation." *Id*. That conclusion is plainly erroneous. As the appellate courts of several other states have recognized, the duty to maximize shareholder value and the duty of candor are duties owed to shareholders rather than the corporate entity, and the harm resulting from a breach of those duties is solely to the shareholders. *Shenker*, 411 Md at 346-47 ("[I]t is clear that, here, the injury alleged, namely, a lesser value that shareholders received for their shares in the cash-out merger, is an injury suffered solely by the shareholders and not by Laureate as a corporate entity. Such an injury, if suffered, is a direct one, separate from any injury suffered by the corporation, thus allowing Petitioners to proceed with their direct action against Board Respondents. A higher or lower price received by shareholders for their shares in the cash-out merger in no way implicated Laureate's interests and causes no harm to the corporation."); *Cohen*, 119 Nev at 19 ("The shareholder has lost unique personal property-his or her interest in a

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of a Delaware corporation are required to disclose fully and fairly all material information within the board's control.'") (quoting *Malone v Brincat*, 722 A2d 5, 12 (Del, 1998)).

Some courts have found that the duty to maximize shareholder value and the duty of candor are not free-standing duties, but rather, are subsumed within directors' duties of care, loyalty, and good faith, which are generally codified in states' director duties statutes. *See Malpiede v Townson*, 780 A2d 1075, 1086 (Del, 2001). Others have categorized these duties as independent common-law duties. *Shenker*, 411 Md at 337-41, 351. In the decision below, the Court of Appeals found that the duty to maximize shareholder value and duty of candor are common-law duties rather than duties subsumed within the statutory duties codified in MCL 450.1541a. *Murphy*, unpub op at 4-5. The Court of Appeals further suggested that shareholders cannot "bring a direct statutory claim under § 541" because the statute provides that directors must act "in the best interest of *the corporation*[,]" not the shareholders. *Id*. at 4. The Court of Appeals' reasoning on this point was flawed, as section 541a is patterned after the Model Business Corporation Act § 8.30, which makes clear that "[t]he term 'corporation' is a surrogate for the business enterprise *as well as a frame of reference encompassing the shareholder body*." Model Bus. Corp. Act § 8.30, cmt. 1 (emphasis added). In other words, "the MBCA confirms the common understanding that directors have a duty to act in the best interests of the company *and its shareholders*." John C. Wilcox, *The Model Business Corporation Act At Sixty: Comply-And-Explain: Should Directors Have A Duty To Inform?*, 74 Law & Contemp Prob 149, 152 (2011) (emphasis added).

specific corporation. Therefore, if the complaint alleges damages resulting from an improper merger, it should not be dismissed as a derivative claim."); *Parnes*, 722 A2d at 1245 (same); *Rael*, 147 NM at 311 (same); *Moore*, 258 So 3d at 757 (same); *In re J.P. Morgan Chase & Co. Shareholder Litigation v Harrison*, 906 A2d 766, 772 (Del, 2006) ("[W]here it is claimed that a duty of disclosure violation impaired the stockholders' right to cast an informed vote, that claim is direct.")[6]; *see also Am. Union Ins. Co. v Meridian Ins. Grp., Inc.*, 137 F Supp 2d 1096, 1111 (SD Ind, 2001) (distinguishing between instances "[w]here the value of shares has been reduced as a result of an injury to the corporation," and "where the alleged wrong is an agreement to a cash-out merger at an inadequate share price[,]" and explaining "[w]here the alleged wrong is an agreement to a cash-out merger at an inadequate share price, however, the corporation itself is not injured. The shareholders are injured.").

Accordingly, the decision at issue conflicts with the very precedent it purported to apply (*Mudgett*), as well as the above-cited opinions from this Court and the Court of Appeals recognizing a duty to maximize shareholder value and a duty of candor, *supra* note 5, providing another basis for review. *See* MCR 7.305(B)(5)(b). Indeed, those duties become meaningless if shareholders lack standing to enforce them in a direct action because, as noted above, mischaracterizing the claims as derivative effectively forecloses shareholders from pursuing them. *Supra* Argument § I.

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[6] Courts considering the proper measure of damages for a breach of the duty of candor in the merger context "consistently have held that quasi-appraisal damages are available [] when a fiduciary breaches its duty of disclosure in connection with a transaction that requires a stockholder vote. The premise for the award is that without the disclosure of false or misleading information, or the failure to disclose material information, stockholders could have voted down the transaction and retained their proportionate share of the equity in the corporation as a going concern. Quasi-appraisal damages serve as a monetary substitute for the proportionate share of the equity that the stockholders otherwise would have retained." *In re Orchard Enterprises, Inc*, 88 A3d 1, 42 (Del Ch, 2014).

CONCLUSION AND RELIEF SOUGHT

As the above-referenced opinions from the appellate courts of numerous other states make clear:

> Claims that management has sold out too cheaply in a merger are also examples of direct claims. Even assuming actionable mismanagement, the entity has suffered no injury. The consideration runs to the owners, not the entity, so any consideration "left on the table" would not have benefited the entity. The harm, therefore, is not only first, but also exclusively, to the owners.
>
> Any other conclusion would produce absurd results. Consider the following example:
>
> Entity A agrees to be merged into Entity B. The managers of Entity A are grossly negligent in their "due diligence" and negotiating tactics and agree to a price far below any reasonably "fair" level. The gross negligence comes to light only after the merger has become effective. If the claims are derivative, they have transferred by operation of law to Entity B, the surviving entity which was benefited rather than harmed by the breach of the duty of care committed by the managers of Entity A.

Kleinberger Article, 58 Baylor L Rev at 90-91.

This case presents the Court with an opportunity to provide much needed clarification on a corporate law issue of major significance, and to rectify a clearly erroneous decision that, if left standing, will result in manifest injustice. This Court has never addressed the common law tests for distinguishing direct from derivative claims in an opinion with a clear holding, particularly in the context of an action asserting breaches of fiduciary duties in connection with a merger. Lacking clear guidance from this Court, the lower courts have misapplied the common law tests for distinguishing direct claims from derivative ones in the context of shareholder challenges to unfair mergers.

When faced with the same problem, the highest courts of several other states stepped in to provide the clarity and certainty that both shareholders and corporations seek. Plaintiff now respectfully asks this Court to do the same. Absent intervention by this Court, Michigan law on

this issue will remain at odds with the law of numerous other states. Furthermore, shareholders of Michigan corporations who are the victims of mergers orchestrated through unfair dealing will continue to be left without legal recourse, which will undoubtedly affect the willingness of shareholders to invest in Michigan corporations. The Court should address this issue of major significance to the State's jurisprudence and remedy the material injustice the Court of Appeals' opinion will inflict.

For the foregoing reasons, Plaintiff respectfully requests that this Court grant Plaintiff leave to appeal or, in lieu of granting leave, peremptorily reverse the Court of Appeals' decision, reverse the Circuit Court's grant of summary disposition to Defendants, and remand for further proceedings.

Dated: June 10, 2020

Respectfully submitted,

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Index of Exhibits

EXHIBIT 1

STATE OF MICHIGAN

COURT OF APPEALS

LESLIE J. MURPHY,

Plaintiff-Appellant,

v

SAMUEL M. INMAN, III, JOHN F. SMITH, BERNARD M. GOLDSMITH, WILLIAM O. GRABE, LAWRENCE DAVID HANSEN, ANDREAS MAI, JONATHAN YARON, ENRICO DIGIROLAMO,

Defendants-Appellees.

UNPUBLISHED
April 30, 2020

No. 345758
Oakland Circuit Court
LC No. 2017-159571-CB

Before: GLEICHER, P.J., and GADOLA and LETICA, JJ.

PER CURIAM.

Plaintiff Leslie Murphy, a former shareholder of Covisint Corporation (Covisint), appeals as of right the trial court's grant of summary disposition in favor of defendants, some of Covisint's former directors and officers, on his claim that defendants breached their statutory and common-law fiduciary duties of care, loyalty, good faith, independence, and candor that they owed to plaintiff and all similarly situated shareholders regarding a cash-merger between Covisint and Open Text Corporation (OpenText). We affirm.

I. BACKGROUND

In June 2017, Covisint announced a merger agreement with OpenText, by which OpenText would acquire all outstanding shares of Covisint's stock for $2.45 a share. In July, a majority of the outstanding shareholders voted to approve the merger. Plaintiff filed the instant amended complaint in September. He raised one claim for relief, alleging that defendants violated their statutory and common-law fiduciary duties of care, loyalty, good faith, independence, and candor owed to the public shareholders of Covisint, and acted in bad faith. Plaintiff alleged that defendants, in the process of the merger: (1) inadequately compensated shareholders; (2) engaged in a flawed sales process; (3) sold Covisint at an unfair price rather than pursuing other strategic alternatives to maximize shareholder value; (4) acted in their self-interest; (5) acted in bad faith

and in breach of their fiduciary duties by including certain provisions in the confidentially agreements with other interested potential buyers; and (6) breached their duty of candor when they issued a materially incomplete and misleading proxy statement that omitted information necessary to enable the shareholders to cast an informed vote.

In March 2018, defendants moved for summary disposition under MCR 2.116(C)(5) and (8), arguing that plaintiff lacked standing to bring a direct claim because his sole claim for breach of fiduciary duties was derivative in nature and plaintiff did not satisfy the requirements to bring a derivative law suit. Plaintiff responded that his claim under MCL 450.1541a was not required to be brought derivatively and, in any event, his common-law claim for breach of fiduciary duty fit within the exceptions permitting a shareholder to bring a direct action. Defendants replied that plaintiff could only bring a derivative claim under § 541a and could not circumvent the bar in § 541a by attempting to bring the same claim under the common-law. They also argued that plaintiff's claim was nonetheless derivative.

The trial court granted defendants' motion for summary disposition under MCR 2.116(C)(5), concluding that plaintiff lacked standing. The trial court determined that plaintiff's claim was derivative and thus could not be brought in his individual capacity or derivatively, as he failed to comply with MCL 450.1493a. This appeal follows.

II. DISCUSSION

On appeal, plaintiff argues he has standing to bring a direct action against defendants for breach of their common-law and statutory fiduciary duties of loyalty, good faith, due care, and candor owed to the shareholders in connection with the cash-out merger; specifically, in relation to the allegedly inadequate sales process. He primarily argues that, in the factual context of a cash-out merger, directors owe the shareholders a duty to maximize the value of their shares and a duty to disclose. He asserts that a violation of these duties directly injures the shareholders, not the corporation, because the shareholders receive an inadequate price and are deprived of a fully-informed vote. We reject plaintiff's arguments.

A. STANDARD OF REVIEW

We review whether a plaintiff has standing de novo. *Crawford v Dep't of Civil Services*, 466 Mich 250, 255; 645 NW2d 6 (2002). We review the trial court's decision on a motion for summary disposition de novo. *Cannon Twp v Rockford Public Schools*, 311 Mich App 403, 410; 875 NW2d 242 (2015). Defendants moved for summary disposition under MCR 2.116(C)(5) (lack of legal capacity to sue) and (C)(8) (failure to state a claim upon which relief can be granted), and the trial court granted the motion pursuant to section (C)(5). However, as plaintiff correctly notes on appeal, "our Supreme Court has previously held the real-party-in-interest defense is not the same as the legal-capacity-to-sue defense." *Id*. at 411 (brackets and quotation marks omitted). "Accordingly, a motion for summary disposition asserting the real-party-in-interest defense more properly fits within MCR 2.116(C)(8) or MCR 2.116(C)(10), depending on the pleadings or other circumstances of the particular case." *Id*. (quotation marks omitted). Thus, we conclude that (C)(5) was not the proper subrule for the trial court to consider.

However, we may address the standing issue under MCR 2.116(C)(8). See *Middlebrooks v Wayne County*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id*. "A motion under MCR 2.116(C)(8) may be granted only where the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id*. (quotation marks omitted). "When deciding a motion brought under this section, a court considers only the pleadings." *Id*. at 119-120.

B. ANALYSIS

As an initial matter, we reject plaintiff's attempts to separate his singular claim—defendants' alleged breach of their fiduciary duties—into statutory and common-law grounds. We agree with the trial court that the distinction plaintiff attempts to make does not alter the outcome. Regardless of whether plaintiff relies on a statutory or common-law basis for the stated breach of fiduciary duty claim in his complaint, his singular claim relies on the same facts and complains of the same alleged injury. Thus, we examine his claim under both relevant statutory authority and caselaw to determine whether the trial court erred when it concluded that his claim could only be brought derivatively.[1]

Michigan's Business Corporation Act provides that "[t]he business and affairs of a corporation shall be managed by or under the discretion of its board," MCL 450.1501, and sets forth the duty of care owed by directors and officers, MCL 450.1541a. Specifically, it provides that a director or officer must discharge his or her duties "[i]n good faith," "[w]ith the care an ordinarily prudent person in a like position would exercise under similar circumstances," and "[i]n a manner he or she reasonably believes to be in the best interests of the corporation." MCL 450.1541a(1).

Relying on *Estes v Idea Engineering & Fabricating, Inc*, 250 Mich App 270, 285; 649 NW2d 84 (2002), defendants argue that plaintiff does not have standing to bring a direct claim for breach of duty under § 541a and thus his claim must be brought derivatively on behalf of the corporation. Plaintiff disagrees, arguing that the statutory language of MCL 450.1541a(4), which sets forth the limitations period for a § 541a claim, does not expressly limit who may bring an action for breach of a statutory fiduciary duty.

At issue in *Estes* was whether a different section of the Act, MCL 450.1489, which provides a non-controlling shareholder in a closely-held corporation a direct cause of action against a director or officer for oppressive conduct–conduct that is "illegal, fraudulent, or willfully unfair and oppressive to the corporation or the shareholder," created a separate cause of action for shareholders of closely-held corporations. *Estes*, 250 Mich App at 278-286 (quotation marks omitted). Thus, plaintiff correctly asserts that we did not hold in *Estes* that a claim under MCL 450.1541a can only be brought derivatively. But in distinguishing a § 489 suit from a § 541a suit,

[1] Michigan's Business Corporation Act defines a "derivative proceeding" as "a civil suit in the right of a domestic corporation or a foreign corporation that is authorized to or does transact business in this state." MCL 450.1491a(a).

we noted three crucial differences between the two statues. First, we noted that "[a] § 489 suit seeks to redress oppression that injures either the corporation or the shareholder, whereas a § 541a suit seeks to redress wrongs to the corporation." *Id*. at 282 (quotation marks omitted). Second we stated that, "[t]he plaintiffs in a § 489 suit may represent themselves and other similarly situated shareholders and bring their suits as individual or direct actions. The plaintiffs in § 541 suits typically represent the corporation and bring their suits as derivative actions pursuant to § 492a." *Id*. at 283. Third, we then stated:

> Further, . . . the plaintiff in the § 489 case is a shareholder suing directly whereas a plaintiff in a § 541a action is a corporation suing for breach of a duty to the corporation or a shareholder suing derivatively on behalf of the corporation. . . . Additionally, the remedy under § 541a is for the benefit of the corporation and the harm done to it whereas certain of the remedies contained in § 489 are specifically for the benefit of the shareholder, and may not necessarily benefit and could impose obligations on the corporation." [*Id*. at 285.]

Section 541a(1) requires a director or officer to discharge his duties "[i]n good faith," "[w]ith the care an ordinarily prudent person in a like position would exercise under similar circumstances," and "[i]n a manner he or she reasonably believes to be *in the best interests of the corporation*." (Emphasis added.) Therefore, an action brought under § 541a seeks to redress wrongs to the corporation. *Estes*, 250 Mich App at 285. It follows that the statutory claim should generally be brought by the corporation or a shareholder on behalf of the corporation. Thus, based on *Estes*'s reasoning, plaintiff could not bring a direct statutory claim under § 541 against defendants for breach of duties owed directly to the shareholder independent of the corporation.

We have also long-recognized in our common law that "the directors of a corporation owe fiduciary duties to stockholders and are bound to act in good faith for the benefit of the corporation." *Wallad v Access Bidco, Inc*, 236 Mich App 303, 306; 600 NW2d 664 (1999). While corporate directors and officers owe fiduciary duties to the shareholders, "a suit to enforce corporate rights or to redress or prevent injury to the corporation, whether arising out of contract or tort, must be brought in the name of the corporation and not that of a stockholder, officer, or employee." *Michigan National Bank v Mudgett*, 178 Mich App 677, 679; 444 NW2d 534 (1989); see also *Belle Isle Grill Corp v City of Detroit*, 256 Mich App 463, 474; 666 NW2d 271 (2003). Our Courts, in distinguishing between a direct and derivative shareholder suit, have recognized two exceptions to this general rule where (1) the individual "has sustained a loss separate and distinct from that of other stockholders generally," *Christner v Anderson, Nietzke & Co, PC*, 433 Mich 1, 9; 444 NW2d 779 (1989) (quotation marks omitted), or where (2) the individual shows a "violation of a duty owed directly to the individual that is independent of the corporation," *Belle Isle Grill*, 256 Mich App at 474; see also *Mudgett*, 178 Mich App at 679-680.

The gravamen of plaintiff's complaint asserts that defendants breached many of their fiduciary duties while making strategic decisions during the process of arranging Covisint's cash-out merger with OpenText by making the decision to sell, by creating and failing to prevent the adverse consequences of the sale, and by failing to disclose material information prior to the vote. Plaintiff's claim does not meet either of the enumerated exceptions. Plaintiff raises no allegations demonstrating that defendants breached their duties outside of those they also owed to Covisint. In other words, plaintiff makes no allegation that there was a breach of duty owed directly to the

shareholders, independent of the corporation. *Belle Isle Grill*, 256 Mich App at 474; *Mudgett*, 178 Mich App at 679-680. Defendants' strategic decision to sell and their decisions made in connection with that sale, as well as their general duty to maximize shareholder value, are not duties owed directly to the shareholders that is distinct from, or independent of, the corporation. *Belle Isle Grill*, 256 Mich App at 474.

Moreover, although plaintiff does allege that defendants breached their duty of candor[2] to the shareholders, he only alleged this in his complaint in relation to the sale. Specifically, plaintiff alleged in his complaint that defendants breached their duty of candor when they issued a materially incomplete and misleading proxy statement, thus depriving Covisint's shareholders the ability to make an informed vote. Despite its focus on the shareholders, this allegation is legally indistinguishable from the others. This allegation relates to the harm done to the corporation when defendants did not disclose material information, which, in part, resulted in Covisint's merger with OpenText for an inadequate share price. Thus, plaintiff cannot demonstrate that defendants' alleged actions here breached a duty to the shareholders distinct from that also owed to the corporation. *Belle Isle Grill*, 256 Mich App at 474.

Lastly, plaintiff cannot show that he has sustained injury that is separate and distinct from that of other shareholders. *Christner*, 433 Mich at 9. Accordingly, plaintiff lacked standing to bring his claim alleging breach of fiduciary duties in his individual capacity. Moreover, plaintiff cannot pursue a derivative claim because he does not allege or argue that he complied with the requirements necessary to commence a derivative proceeding under MCL 450.1493a. Thus, we find no error in the trial court's order granting summary disposition to defendants.[3]

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Michael F. Gadola
/s/ Anica Letica

[2] Under our precedent, we conclude that candor is a common-law fiduciary duty. See *Lumber Village, Inc v Siegler*, 135 Mich App 685, 695; 355 NW2d 654 (1984) (stating that "there is an affirmative duty to disclose where the parties are in a fiduciary relationship").

[3] As the trial court's reasoning was correct, we decline to address defendants' alternatively argued ground for affirmance.

EXHIBIT 2

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

LESLIE MURPHY,

Plaintiff,

Case No. 17-159571-CB

v

Hon. Wendy Potts

SAMUEL M. INMAN, III, JOHN F. SMITH, BERNARD M. GOLDSMITH, WILLIAM O. GRABE, LAWRENCE DAVID HANSEN, ANDREAS MAI, JONATHAN YARON, and ENRICO DIGIROLAMO,

Defendants.
_____/

OPINION AND ORDER

At a session of Court
Held in Pontiac, Michigan
On

SEP 17 2018

This matter is before the Court on Defendants' motion for summary disposition under MCR 2.116(C)(5) and (8). Plaintiff, a former shareholder of Covisint Corporation, filed this action challenging the merger of Covisint with OpenText Corporation. The shareholders voted to approve the merger on July 25, 2017. Plaintiff alleges that Defendants, who were former directors and/or officers of Covisint, breached their fiduciary duties to the shareholders by

pursuing and finalizing the merger because it was in their personal financial interests to do so despite the fact that the merger was not in the shareholders' best interests.

A motion under MCR 2.116(C)(5) should be granted when the party asserting a claim lacks the legal capacity to sue. When considering a motion under MCR 2.116(C)(5), the Court must consider the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties. MCR 2.116(G)(5); *McHone v Sosnowksi,* 239 Mich App 674, 676; 609 NW2d 844 (2000). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint by the pleadings alone. *Maiden v Rozwood,* 461 Mich 109, 119-120; 597 NW2d 817 (1999). All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Id.* A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.*

Defendants first argue that Plaintiff's breach of fiduciary duty claim should be dismissed for lack of standing because Plaintiff cannot bring a derivative claim in his individual capacity. Further, Defendants argue that Plaintiff failed to comply with MCL 450.1493a, which provides that a shareholder may not commence a derivative proceeding before (1) a written demand has been made upon the corporation, and (2) 90 days have expired from the date the demand was made unless the shareholder has earlier been notified that the demand has been rejected by the corporation or unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period.

A "derivative proceeding" is "a civil suit in the right of a domestic corporation or a foreign corporation that is authorized to or does transact business in this state." MCL 450.1491a.

The distinction between a derivative proceeding and an action that may be brought by a shareholder, individually, against a corporation has been explained as follows:

> In general, a suit to enforce corporate rights or to redress or prevent injury to the corporation, whether arising out of contract or tort, must be brought in the name of the corporation and not that of a stockholder, officer or employee.
>
> The general rule is inapplicable where the individual shows a violation of a duty owed directly to him. This exception does not arise, however, merely because the acts complained of resulted in damage both to the corporation and to the individual, but is limited to cases where the wrong done amounts to a breach of duty owed to the individual personally. Thus, where the alleged injury to the individual results only from the injury to the corporation, the injury is merely derivative and the individual does not have a right of action against the third party. [*Michigan National Bank v Mudgett*, 178 Mich App 677, 679-680; 444 NW2d 534 (1999)(citations omitted.)]

In addition, Michigan courts recognize a second exception to the general rule that shareholders may only sue a corporation in a derivative action where the shareholder "has sustained a loss separate and distinct from that of other stockholders generally." *Christner v Anderson, Nietzke & Co, PC,* 433 Mich 1, 9; 444 NW2d 779 (1989). Thus, in order to have standing to bring his claim against the corporation individually, Plaintiff must show either (1) a violation of duty owed directly to him that results in damage to him that is independent of damage to the corporation, or (2) a loss separate and distinct from that of other shareholders.

Plaintiff alleges that Defendants breached their fiduciary duties of care, loyalty, good faith, independence, and candor by (1) pursuing and finalizing the merger despite knowing that it was not fair to the shareholders, (2) favoring OpenText over other bidders and giving OpenText preferential treatment during the sale process, and (3) agreeing to the merger to advance their own personal financial interests and placing their own interests ahead of the interests of the shareholders. Plaintiff alleges that, as a result of Defendants' breaches of their fiduciary duties,

he did not receive fair consideration for his shares, that he was prevented from obtaining a fair price for his common stock, and that he was unable to make an informed decision whether to vote in favor of the merger.

While Plaintiff alleges an injury to himself as a shareholder, the alleged injury affects both the corporation and himself. Plaintiff alleges that Defendants' breaches of their fiduciary duties resulted in an unfair price for his shares. Such an alleged injury affects the corporation itself in the same manner that it affects Plaintiff, i.e. the price of the company's stock was lower than it would have been had Defendants not breached their fiduciary duties. In other words, Plaintiff cannot demonstrate an injury to himself without showing an injury to the corporation. *Michigan National Bank,* 178 Mich App at 679-690. Further, Plaintiff has not alleged an injury that is separate and distinct from that of other shareholders generally.[1] *Christner,* 433 Mich at 9. Because Plaintiff's breach of fiduciary duty claim alleges an injury that was derivative of the injury caused to the corporation itself, Plaintiff was required to bring the claim on behalf of the corporation rather than individually.

Plaintiff argues that, even if he is not entitled to bring a breach of fiduciary duty claim individually under MCL 450.1541a, he has alleged that Defendants breached common law fiduciary duties owed to shareholders. This Court concludes that Plaintiff's attempt to distinguish a breach of fiduciary duty claim brought under MCL 450.1541a from a claim based on common law is a distinction without a difference. Regardless of whether the claim is based on statute or common law, "a suit to enforce corporate rights or to redress or prevent injury to the

[1] Compare, *In re ITC Holdings Corp Shareholder Litigation,* Oakland Circuit Court Case No. 16-151852-CB, issued June 8, 2016, cited by both parties, in which the plaintiff would have received half cash and half stock in the proposed merger, while the Board and management were to receive all cash payments. Thus, the Court concluded that, unlike the Board and management, the plaintiff bore the risk of a stock decline and had alleged personal harm.

corporation . . . must be brought in the name of the corporation and not that of the stockholder, officer or employee." *Michigan National Bank,* 178 Mich App at 679. Because the statutory and common law claims are based on the same alleged injury, the Court concludes that the common law breach of fiduciary duty claims were required to be brought as derivative claims. The Court therefore concludes that Plaintiff lacks standing to bring his claims individually. Further, Plaintiff cannot bring his claims as a derivative action because it is undisputed that he failed to comply with MCL 450.1493a. The Court therefore concludes that Defendants are entitled to summary disposition under MCR 2.116(C)(5).

WHEREFORE, IT IS HEREBY ORDERED that Defendants' motion for summary disposition under MCR 2.116(C)(5) is GRANTED.

This Opinion and Order resolves all pending claims and closes the case.

IT IS SO ORDERED.

Hon. Wendy Potts, Circuit Judge

SEP 17 2018